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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/613,374	07/03/2003	Sudhin Datta	98B037A/2	7189

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EXAMINER

NUTTER, NATHAN M

ART UNIT	PAPER NUMBER
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1711

DATE MAILED: 01/03/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/613,374

Applicant(s)

DATTA ET AL.

Examiner

Nathan M. Nutter

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 39-48 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 39-48 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 03 July 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 39-48 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claims contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention.

The Specification, as filed, does not appear to support the recitations of the claims with regards to the particular monomeric constituents of the polymer designated as (A), the particular compositional limitations or the physical property of the inherent X-ray diffraction pattern. The recitations of the ranges of "about 96 to about 88.4 weight percent of propylene derived units and about 4 to about 11.6 weight percent of ethylene derived units" of the SPC, the copolymer(s) relied upon as representing polymer (A), are not disclosed as being preferred ranges, or in any context as chosen ranges for the monomers. The only support derives from an overlap of the SPC as "having about 4 wt. % to about 35 wt. % ethylene" purported to show the inventive concept at page 8 (lines 11-13). There is no guidance or reason for the claimed cutoff at "about 11.6 weight percent of ethylene derived units." The content of the SPC is recited to embrace "from about 5% to about 99% by weight" of the polymer blend. In the Appendix page A-5 of

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the Paper filed 21 April 2004 as an Amendment and Reply to Office Action, the recitation of claim 39 regarding the SPC refer to the SPC2 as being optional. The Reply goes on to allege that the Declaration of Rufina Alamo states conclusively that the "propylene-ethylene copolymers of the type made using the process of Applicants' Example 1 and having an ethylene content of up to at least 11.6 weight percent (e.g., SPC-1 and SPC-3) have more gamma-form crystals than a comparable copolymers (*sic*) made using a Ziegler-Natta catalyst." While it is agreed that the "compositions of the present invention may comprise from about 5% to about 99% by weight of the SPC," nothing is disclosed concerning the "optional" constituent SPC2. Nothing is taught regarding the inclusion of this "optional" constituent as to compositional limitations. Since the constituent is "Optional" it is not clear, nor can it be inferred that this copolymer represents "about 5% to about 99% by weight" of the total composition, as claimed. Further, the Declaration at page 3, paragraph 9, refers to "the exemplary copolymer SPC2 that is discussed at page 44 of the Datta '374 application." The Declaration states that the "SPC2 had an ethylene content of 5.8 weight percent (8.45 mole %)" and concludes "that a slow crystallization of SPC2 would result in greater than 90% of the gamma polymorph for all crystals formed under the described conditions (see Datta '374 application, Example 1, pp. 35-36)." The SPC2 referred to is not even documented in the Table 7. Further, it is pointed out that this SPC2 differs from the SPC2 disclosed at page 37 in Table 1 which has an ethylene content of 9.4 wt. %. In the analysis purported to show the X-ray diffraction pattern, the Amendment and Reply to Office Action states that "(a)s demonstrated in the Declaration of professor Rufina G.

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Alamo, propylene-ethylene copolymers of the type made using the process of Applicants' Example 1 and having an ethylene content of up to at least 11.6 weight percent (e.g., SPC-1 and SPC-3) have more gamma-form crystals than a comparable copolymers made using a Ziegler-Natta catalyst." That Declaration DOES NOT refer to "SPC-1" or "SPC-3." Furthermore, there is no comparison present to any copolymer produced from a Ziegler-Natta catalyst, only speculation. It is not understood by this Examiner why any property that may be measured by known testing means would necessarily need to be inferred from literature rather than from direct observation and testing. The property of having "an X-ray diffraction pattern that exhibits more gamma-form crystals than a copolymer comparable in all respects except that it is prepared with a Ziegler-Natta catalyst" is measurable. Further, it is pointed out that from the entirety of the Specification, this teaching of picking one isolated example from the entirety of the disclosure fails to support the claims, as now filed, since the application is not viewed in minute teachings recounted to support the claim, as drafted. This declaration, as filed, cannot be used to cure the deficiencies of the disclosure since it is deficient in its own assumptions providing only speculation.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent

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granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

(g)(1) during the course of an interference conducted under section 135 or section 291, another inventor involved therein establishes, to the extent permitted in section 104, that before such person's invention thereof the invention was made by such other inventor and not abandoned, suppressed, or concealed, or (2) before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

Claims 39-48 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Saito et al ('505), cited by applicants.

The reference to Saito et al teaches the manufacture of an article of manufacture made from a polymer blend comprising at least one polymer (A) comprising a copolymer of propylene and "not more than 5% by weight of α -olefin.....preferably ethylene", which reads on the polymeric constituents of the instant claims wherein the ethylene content is from "about 4 to about" 5 weight percent of ethylene units. Note column 2 (lines 33-53). The reference teaches the admixture of this polypropylene copolymer with a stereoregular polypropylene (thermoplastic) in the relative amounts of "20 to 95% by weight of (the) stereoregular polypropylene and 5 to 80% by weight of (the) α -olefin copolymer. There is overlap of claim 41 for polymer (A) at 30 to 80 wt. %, of claim 43 at 60 to 80 wt % and of claim 45 at 75 to 80 wt %. The reference teaches the use of this composition to make films, as recited in instant claims 40, 42, 44, 46 and 48. Using the same inference and assertions by counsel with regard to the Rufina Alamo Declaration, it is submitted that the "polymer (A) (would be) further characterized as having an X-ray diffraction pattern that exhibits more gamma-form crystals than a

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copolymer comparable in all respects except that it is prepared with a Ziegler-Natta catalyst."

Claims 39-44, 47 and 48 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Asanuma et al ('389), cited by applicants.

The reference to Asanuma et al teaches the manufacture of an article of manufacture made from a polymer blend comprising at least one polymer (A) comprising a copolymer of propylene and "not more than 5% by weight of α -olefin.....preferably ethylene", which reads on the polymeric constituents of the instant claims wherein the ethylene content is from 10 "to about 11.6 weight percent of ethylene units." Note column 3 (lines 13-34). The reference teaches the admixture of this polypropylene copolymer with a polypropylene (thermoplastic) in the relative amounts of "the weight ratio of the polypropylene to the copolymer is preferably not less than 30/70" at column 3 (lines 62-67). There is overlap of claims 41 and 47 for polymer (A) at 30 to 70 parts polypropylene to copolymer and of claim 43 at 60 to 70 parts polypropylene to copolymer. The reference teaches the use of this composition to make films, as recited in instant claims 40, 42, 44, 46 and 48. Using the same inference and assertions by counsel with regard to the Rufina Alamo Declaration, it is submitted that the "polymer (A) (would be) further characterized as having an X-ray diffraction pattern that exhibits more gamma-form crystals than a copolymer comparable in all respects except that it is prepared with a Ziegler-Natta catalyst."

Claims 39, 41, 43, 45 and 47 are rejected under 35 U.S.C. 102(e) as being anticipated by Wouters ('847), cited by applicants.

The applied reference has a common assignee with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

The reference, Wouters et al, teaches the manufacture of an article of manufacture made from a polymer blend comprising at least one polymer (A) comprising a copolymer of propylene and "from about 1 to about 25 wt. % ethylene", which reads on the polymeric constituents of the instant claims wherein the ethylene content is from "about 4 to about 11.6 weight percent of ethylene units." Note column 4 (lines 30-44). The reference teaches the admixture of this polypropylene copolymer with a polypropylene (thermoplastic) in the relative amounts of "propylene polymer content in the range of from 50 to 95 weight percent" at column 8 (lines 21-24). There is overlap of claims 41 and 47 for polymer (A) at 50 to 95 weight percent polypropylene to copolymer, of claim 43 at 60 to 95 weight percent polypropylene to copolymer, and of claim 45 of from 75 to 95 weight percent polypropylene to copolymer. Using the same inference and assertions by counsel with regard to the Rufina Alamo Declaration, it is submitted that the "polymer (A) (would be) further characterized as having an X-ray

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diffraction pattern that exhibits more gamma-form crystals than a copolymer comparable in all respects except that it is prepared with a Ziegler-Natta catalyst."

Claims 39, 41 and 47 are rejected under 35 U.S.C. 102(e) as being anticipated by Kaufman et al ('856), cited by applicants.

The applied reference has a common assignee with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

The reference Kaufman et al teaches the manufacture of an article of manufacture made from a polymer blend comprising at least one polymer (A) comprising a copolymer of ethylene-propylene "having a propylene content of greater than 80 weight percent", which reads on the polymeric constituents of the instant claims wherein the ethylene content is from "about 4 to about 11.6 weight percent of ethylene units." Note column 2 (lines 7-16). The reference teaches this polypropylene copolymer to comprise "88 to 50 weight percent" of the total blend composition, leaving the copolymer designated herein as (A) to be included at 12 to 50 weight percent at column 2 (lines 17-24). There is clear overlap of constituents as recited in claims 41 and 47 at 12 to 50 weight percent. Using the same inference and assertions by counsel with regard to the Rufina Alamo Declaration, it is submitted that the "polymer (A) (would be)

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further characterized as having an X-ray diffraction pattern that exhibits more gamma-form crystals than a copolymer comparable in all respects except that it is prepared with a Ziegler-Natta catalyst."

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 39-48 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16 of U.S. Patent No. 6,372,847. Although the conflicting claims are not identical, they are not patentably distinct from each other because the manufacture of film structures from the composition blend, as disclosed, would have been within the skill of an artisan. The reference claims essentially what is recited in claims 39, 41, 43, 45 and 47.

Claims 39-42, 47 and 48 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16 of U.S. Patent No. 6,245,856. Although the conflicting claims are not identical, they are not patentably distinct from each other because the manufacture of film structures from the

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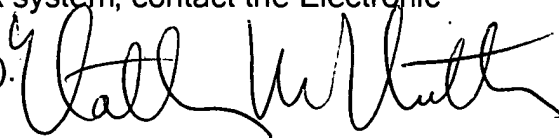
composition blend, as disclosed, would have been within the skill of an artisan. The reference claims essentially what is recited in claims 39, 41 and 47.

Due to the new grounds of rejection, this action is NOT being made FINAL.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nathan M. Nutter whose telephone number is 571-272-1076. The examiner can normally be reached on 9:30 a.m.-6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James J. Seidleck can be reached on 571-272-1078. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Nathan M. Nutter
Primary Examiner
Art Unit 1711

nmn

24 December 2004